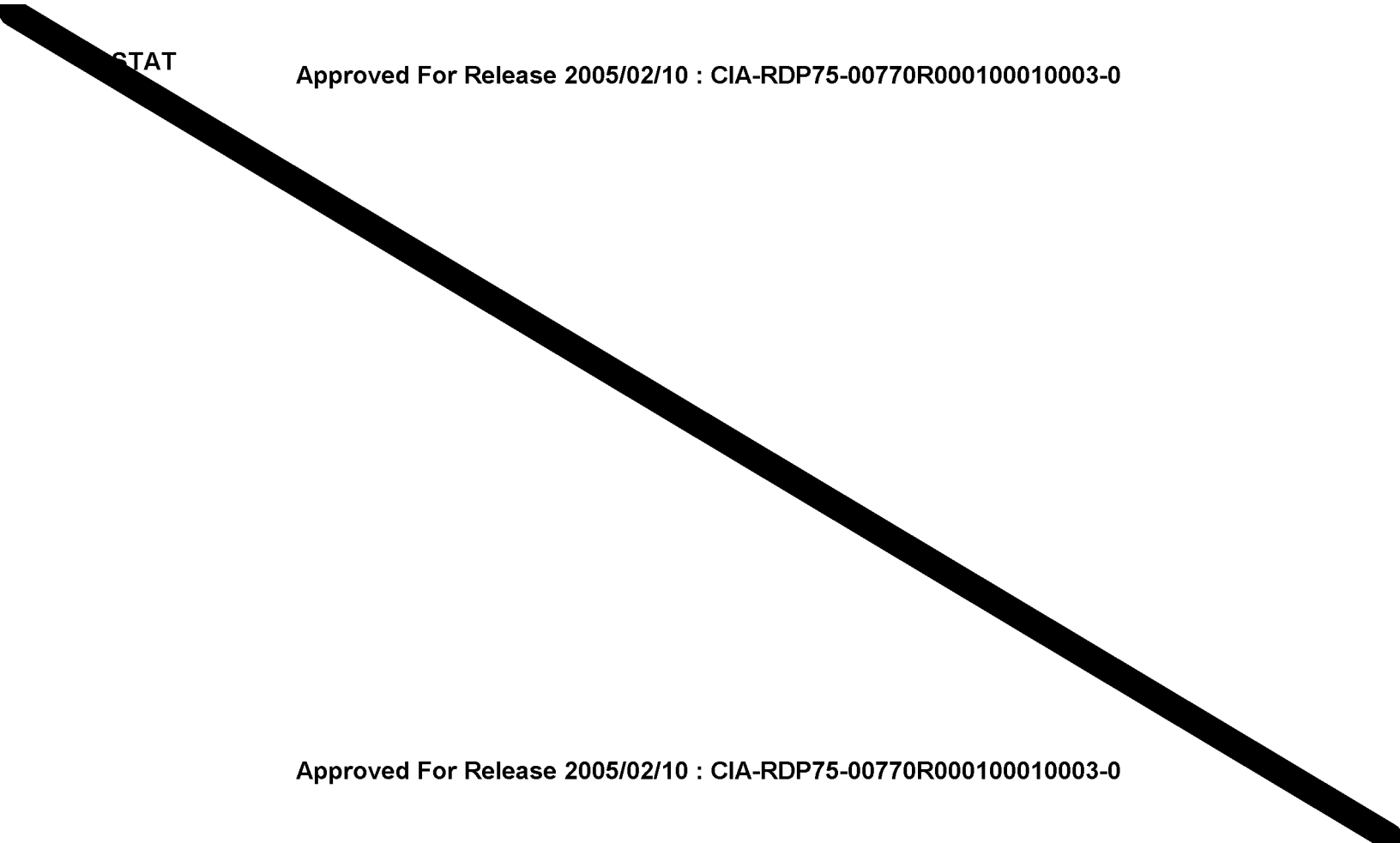

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ARTICLES

NOTES & COMMENTS

RECENT DEVELOPMENTS

THE QUARTERLY SURVEY OF NEW YORK PRACTICE

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crimination which is manifest in the structure of our juvenile court system. It seems clear that every criminal in New York, as long as he is over sixteen, is entitled to have his guilt proven beyond a reasonable doubt. But if he is of a lesser age, the quantum becomes a fair preponderance. Such a policy is contrary to the fundamental fairness which is basic to due process. Moreover, this quantum issue is not merely tangential, but rather is essential to a fair adjudication when liberty is at stake.[70] Regardless of terminology, juvenile court proceedings and criminal convictions result in an identical loss of freedom.

The juvenile offenders of New York deserve a better status than that of "paper citizens" — they are entitled to the same protection and rights as their elder brothers and sisters. And this protection must include the right to be adjudged innocent until proven guilty beyond a reasonable doubt. The *Samuel W.* decision marks a hiatus in New York's juvenile law; for the Court of Appeals has apparently repudiated the state's formerly progressive attitude in the juvenile area. Clearly, the value of other constitutional guarantees is minimized when an individual can be convicted on a mere preponderance of the evidence. Thus, the only viable solution consonant with the rationale of *Gault* is to extend the thrust of that opinion to the quantum of evidence required in a juvenile proceeding. Only through such an extension can the juvenile be assured the constitutional guarantee of due process which *Gault* envisioned.

TORTS — DEFAMATION — EXECUTIVE PRIVILEGE TO DEFAME EXTENDED TO UNDERCOVER AGENT ACTING PURSUANT TO ORDERS. — *Heine v. Raus*, 399 F.2d 785 (4th Cir. 1968).

Appellee, an undercover agent for the Central Intelligence Agency (hereinafter CIA), informed members of an anti-Communist league of which he was a member that appellant was a Soviet agent. Appellant brought an action for slander in a federal district court which resulted in summary judgment for the appellee. The Court of Appeals for the Fourth Circuit, in vacating the judgment and remanding for further proceedings, *held* that the absolute governmental immunity from tort liability for defamation was available to an agent who acted pursuant to instructions issued with the approval of the Director of the CIA or

[70] Kent v. United States, 383 U.S. 541 (1966).
We do not mean . . . to indicate that the hearing to be held must conform with all of the requirements of a criminal trial . . . but we do hold that the hearing must measure up to the essentials of due process and fair treatment. *Id.* at 562.

a subordinate possessing requisite discretionary authority, or pursuant to instructions which were subsequently ratified and approved by the Director or such subordinate.

Due to the availability of numerous defenses or "privileges,"[1] not every person who libels or slanders another is subject to civil liability. For example, truth[2] is a defense which generally offers absolute protection from civil liability, regardless of the speaker's state of mind.[3] In addition, the courts have recognized a second defense, the "qualified" or "conditional" privilege, which confers immunity "conditioned upon a publication in a reasonable manner and for a proper purpose."[4] A third defense is the absolute privilege, under which the speaker will not incur liability regardless of the actual purpose or motive for publishing the defamatory statements.[5]

The successful assertion of the absolute privilege often engenders harsh results upon an injured party. Accordingly, the legislature and the courts have limited the availability of this defense to specific persons and situations. The United States Constitution[6] bestows this absolute privilege upon the legislative branch of our government in order to ensure free discussion of all issues before the Congress.[7] Thus, it was recognized at an early time that the public's interest in a Congress that could act and speak without fear of reprisal for defamatory publications far outweighed the individual's interest in securing a remedy for "wrongful" defamation. Similar reasoning underlies the applica-

1 Some commentators have preferred the use of the term "immunity." *See* W. PROSSER, TORTS § 109, at 795 n.65 (3d ed. 1964); Veeder, *Absolute Immunity in Defamation: Judicial Proceedings*, 9 COLUM. L. REV. 463, 469 (1909) ("The term immunity . . . meets every requirement of scientific terminology, and tends to disabuse the public mind of an inveterate, and perhaps inevitable, prejudice against a doctrine which seems to imply that the law favors malicious defamation.").

2 Also termed "justification." W. PROSSER, TORTS § 111 (3d ed. 1964).

3 W. PROSSER, TORTS § 111 (3d ed. 1964).

The defense of truth is lost in some jurisdictions if the utterance was not made for justifiable ends and/or good motives. *See, e.g.*, Cook v. East Shore Newspapers, 327 Ill. App. 559, 64 N.E.2d 751 (1945); Hutchins v. Page, 75 N.H. 215, 72 A. 689 (1909); Ray, *Truth, A Defense to Libel*, 16 MINN. L. REV. 43 (1931).

4 W. PROSSER, TORTS § 110, at 805 (3d ed. 1964). *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (fair comment on matters of public concern); Johns v. Associated Aviation Underwriters, 203 F.2d 208 (5th Cir. 1953) (communication between insurers and insured held qualifiedly privileged because of common interest).

5 *See* 1 F. HARPER & W. JAMES, TORTS § 5.23 (1956); W. PROSSER, TORTS § 109 (3d ed. 1964); RESTATEMENT (SECOND) OF TORTS, Explanatory Notes § 591, comment *a* at 109 (Tent. Draft No. 12, 1966).

6 U.S. CONST. art. I, § 6: "They [the Senators and Representatives] shall . . . be privileged from arrest . . . and for any Speech or Debate in either House shall not be questioned in any other Place."

7 Veeder, *Absolute Immunity in Defamation: Legislative and Executive Proceedings*, 10 COLUM. L. REV. 131, 134 (1910).

tion of the absolute immunity to judicial proceedings[8] and to executive communications made by governmental officers in the discharge of their duties.[9]

However, the absolute privilege has not been applied as extensively to executive communications as it has in judicial and legislative proceedings. While chief executives and heads of state have always enjoyed the immunity,[10] its availability to lower government officials was not considered by the Supreme Court until *Spalding v. Vilas*.[11] In *Spalding*, the plaintiff-attorney brought an action against the Postmaster General for an alleged libel arising out of the defendant's acts in informing both past and present employees of the Department by letter that an attorney's services were unnecessary for the submission of certain claims arising under federal law. The plaintiff alleged that his reputation had suffered adversely thereby, and, in addition, that the defendant cabinet member had been motivated by malice. However, the Court, in denying recovery, stated that

> the same general considerations of public policy and convenience which demand for judges of courts of superior jurisdiction immunity from civil suits for damage arising from acts done by them in the course of the performance of their judicial functions, apply to a large extent to official communications made by *heads of Executive Departments* when engaged in the discharge of duties imposed upon them by law.[12]

Thus, the *Spalding* Court asserted that as long as the head of an Executive Department acted with the requisite authority, he could not be held personally liable for damages even if the surrounding circumstances indicated that he had acted with some degree of malice.[13] The

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[8] *See* Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1871); Strauss v. Meyer, 48 Ill. 385 (1868). *See generally* Veeder, *Absolute Immunity in Defamation: Judicial Proceedings*, 9 COLUM. L. REV. 463 (1909).

[9] Veeder, *supra* note 7, at 140.

Different considerations underlie the justifications for the application of the absolute privilege in the remaining areas in which it may be asserted as a defense: husband and wife communications, *see, e.g.*, Dyer v. MacDougall, 93 F. Supp. 484 (E.D.N.Y. 1950), still recognizing the fiction of the unity of husband and wife, and therefore holding that publication is impossible; cases in which the plaintiff has expressly or impliedly assented to the communication, *see* W. PROSSER, TORTS § 109 (3d ed. 1964); and political broadcasts, *see, e.g.*, Farmers Educ. and Cooperative Union v. WDAY, Inc., 360 U.S. 525 (1959), where several reasons for applying the privilege are set forth, foremost among them being the fear that censorship of political broadcasts by radio stations attempting to avoid liability for defamation would impinge upon the country's tradition of free expression in the field of broadcasting.

[10] Veeder, *supra* note 7, at 140-41.

[11] 161 U.S. 483 (1896).

[12] *Id.* at 498 (emphasis added).

[13] *Id.*

door had been opened; cases expanding *Spalding* were not long in coming,[14] the tendency of the federal courts being to grant rather than to deny the privilege.[15]

In *De Arnaud v. Ainsworth*,[16] the Court of Appeals for the District of Columbia granted the privilege to a government official of less than cabinet rank — an administrative assistant to the Secretary of War — who had libeled the defendant in a report to the Secretary. The privilege was granted for those official reports and communications which were made to a superior in the course and discharge of official duties.[17] This expanded test, adopted by the *De Arnaud* court in an attempt to delineate the situations in which the absolute privilege would be available to such a subordinate official, clearly identified the determinative factor as the overall propriety of the occasion for the communication, rather than the mere position or rank of the official making it.[18] Thus, in *Mellon v. Brewer*,[19] a federal court held that the privilege was available to a less than cabinet rank official, despite the fact that the internal communications involved, although otherwise privileged, had been reprinted in newspapers and thereby disclosed to the general public.[20]

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14 For an extensive, chronological treatment of the judicial expansion of the absolute privilege in the executive department of the federal government, see Becht, *The Absolute Privilege of the Executive in Defamation*, 15 VAND. L. REV. 1127, 1135-48 (1962).

15 *Contra*, Colpoys v. Gates, 118 F.2d 16 (D.C. Cir. 1941); National Disabled Soldiers' League v. Haan, 4 F.2d 436 (D.C. Cir. 1925). In *Colpoys* the privilege was denied to a United States Marshal who allegedly libeled two of his discharged deputies in news releases explaining his actions. The court distinguished *Spalding* in this manner:

> Cabinet officers have political functions, and public interest is thought to require that they be not restrained by fear of libel suits from publicly explaining their acts and policies. . . . United States Marshals have no such functions. . . . It was not his duty publicly to discuss their dismissal or publicly explain the reasons for it.

118 F.2d at 17.

However, in *National Disabled Soldiers' League*, the court granted only a *qualified* immunity to an official of the Veteran's Bureau who published allegedly defamatory matter in reply to an inquiry by a U.S. Senator.

16 24 App. D.C. 167 (1904), *error dismissed*, 199 U.S. 616 (1905).

17 *Id.* at 178.

18 *Id.* at 181.

The extension by *De Arnaud* met with immediate criticism. *See, e.g.*, 5 L.R.A. 163 (1905):

> Is it wise to protect every petty officer of the government to such an extent that he may, under the disguise of duty, safely make all sorts of false and malicious charges against others, and hold them up to the scorn of ridicule of all who have access to official documents, without the injured party being entitled to legal redress?

19 18 F.2d 168 (D.C. Cir. 1927), *cert. denied*, 275 U.S. 530 (1927).

20 The defendant, the Secretary of the Treasury, in a letter to the President, had challenged the plaintiff's veracity in connection with an investigation into the defendant's department by stating, in part:

> Naturally he presented only such information and only such witnesses as in his opinion would tend to establish his charges. He certainly had no interest in the truth, if it were inconsistent with the charges upon which his employment depended.

18 F.2d at 170.

The court held the communication privileged, deeming it *unnecessary* to consider

The landmark case of *Glass v. Ickes*[21] firmly established the principle alluded to in *Mellon, i.e.*, that a cabinet official was absolutely privileged to issue press releases of a defamatory nature in order to inform those transacting business with his department of official matters pertaining thereto. The plaintiff-attorney, Glass, a former employee of the Department of the Interior, had been prohibited from practicing before the Department or any of its agencies for a period of two years subsequent to the termination of his employment. This prohibition, a departmental regulation promulgated by the Secretary, was intended to prevent the utilization for profit, by former employees, of confidential information acquired while in the employ of the Department. In contravention of this regulation, Glass, a former chief investigator for a departmental agency, attempted to practice before the Department prior to the expiration of the prescribed waiting period. The defendant then issued a press release warning all those who might have business before the Department to avoid dealing with the "barred" Mr. Glass. The court, relying upon *Spalding*, held the defendant's action to be within the protective confines of the absolute privilege, thereby permitting the attention of the public at large to be called to matters within a cabinet officer's discretionary scope of authority.[22]

In 1959, the United States Supreme Court re-examined the availability of the absolute privilege to federal officers in *Barr v. Matteo*.[23] The defendant, Barr, Acting Director of the Office of Rent Stabilization, issued a press release in reference to plaintiffs' planned utilization of agency funds for the apparent financial advantage of agency employees. The plaintiffs contended that the press release, allegedly motivated by malice on the part of Barr, was defamatory both in itself and when read in light of the bitter attack their plan received on the floor of the Senate. Since the defendant was not a cabinet member, and his allegedly defamatory communication was in the nature of a press release seemingly *without* the scope of his official duties, the lower court rendered judgment for the plaintiffs.[24] However, the Supreme Court, in reversing, set forth those factors which were now to be considered in determining the availability of the absolute privilege to subordinate

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whether or not the letter had been released to the newspapers before its insertion into the Congressional Record, as long as it had been sent to the President before its public release. *Id.*

21 117 F.2d 273 (D.C. Cir. 1940), *cert. denied*, 311 U.S. 718 (1941).

22 117 F.2d at 280.

23 360 U.S. 564 (1959).

24 Colpoys v. Gates, 118 F.2d 16 (D.C. Cir. 1941) then appeared to be the controlling precedent. *See supra* note 15.

federal officials. The Court, referring to an earlier opinion by Judge Learned Hand in *Gregoire v. Biddle*,[25] a false imprisonment action, found just reason for permitting even an official who was motivated by malice to avoid personal liability for his defamatory utterances. The *Gregoire* court had previously recognized that to do otherwise would subject the innocent as well as the guilty to numerous suits. It was believed that the resultant burden of defending such actions, and the fear of an unfavorable outcome, would undoubtedly hamper the discharge of official duties.[26] Therefore, the Court espoused that a balance must be struck between the interests of the individual and the public. Moreover, *Barr* held that the principle of *Spalding* was not restricted to cabinet officers, emphasizing that

> the complexities and magnitude of governmental activity have become so great that there must be a delegation and redelegation of authority as to many functions, and we cannot say that these functions become less important simply because they are exercised by officers of lower rank in the executive hierarchy. . . . [T]he occasions upon which the acts of the head of an executive department will be protected are doubtless far broader than in the case of an officer with less sweeping functions. But that is because the higher the post, the broader the range of responsibilities and duties, and the wider the scope of discretion it entails.[27]

Dismissing the contention that the defendant had acted beyond the scope of his authority at the time of the press release, the Court noted that, inasmuch as the alleged defamation fell within the "outer perimeter of petitioner's line of duty", the privilege should have been granted notwithstanding any allegation of malice. The *Barr* Court, in reaching its decision, had balanced "protection of the individual citizen [from] pecuniary damage caused by oppressive or malicious action" by federal officials against "the protection of the public interest by shielding responsible government officers against . . . vindictive or ill-founded damage suits . . . ,"[28] and in the end, the scales were tipped in favor of the latter.

Although the decision was met by a great deal of criticism from legal scholars and students,[29] the doctrine soon became solidly en-

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[25] 177 F.2d 579 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950).

[26] 177 F.2d at 581.

[27] 360 U.S. at 572-73.

[28] *Id.* at 565. *See* the dissenting opinion of Chief Justice Warren, joined by Justice Douglas, in which a different balancing test was proposed. *Id.* at 584 (dissenting opinion).

[29] *See, e.g.*, Becht, *The Absolute Privilege of the Executive in Defamation*, 15 VAND. L. REV. 1127, 1170 (1962); Handler & Klein, *The Defense of Privilege in Defamation Suits Against Government Executive Officials*, 74 HARV. L. REV. 44 (1960); Note, *Absolute Privilege in Defamation: The Extension by* Barr v. Matteo, 21 U. PITTS. L. REV. 41 (1959); 34 ST. JOHN'S L. REV. 168 (1959); 13 VAND. L. REV. 590 (1960). *But see* Note, *Absolute*

trenched in the "federal law of defamation."[30] However, its application to *state officials* of a rank comparable to "the less than cabinet rank official" contemplated by *Barr* has been continually resisted by a large number of states.[31]

The district court in the instant case[32] was confronted with a novel and perplexing problem. Appellant, Eerik Heine, an Estonian emigré and a citizen of Canada, supplemented his income by delivering lectures descriptive of his experiences under Communist rule, and by exhibiting an anti-Communist film to various Estonian emigré groups throughout the United States and Canada. His reputation as an Estonian "liberation" or "freedom" fighter had reaped for him the trust and confidence of the emigré leaders with whom he had come in contact. Appellee, Juri Raus, acting ostensibly in his capacity as the National Commander of the Legion of Estonian Liberation, Inc., informed his Legion associates that Heine, according to information revealed by an "official agency" of the United States, was a "Communist", a "KGB Agent" and a "Communist Agent".[33] Raus' alleged objective was to prevent the Legion's further cooperation with the appellant.

Heine subsequently brought suit against Raus for slander[34] in the District Court of Maryland. Raus' original answer relied upon the defense of qualified privilege derived from his capacity as the Legion's

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Immunity For Press Release of Lesser Executive Officer, 38 TEX. L. REV. 120 (1959); Comment, *Governmental Official's Absolute Privilege in Libel and Slander Suits*, 55 NW. U.L. REV. 228 (1960).

The most oft-recommended alternative to the absolute privilege for subordinate federal officials was an enlargement of the Federal Tort Claims Act (28 U.S.C. §§ 1346(b), 2671-80 (1964)) to include recovery for defamation, in conjunction with a limitation of the doctrine to policy-making federal officials, granting lower federal officials a mere qualified privilege only.

30 "The immunity to be afforded federal officers is *governed by federal law*. . . . In common law actions against state officers . . . the doctrine of immunity is controlled by state law under Erie R.R. v. Tompkins, 304 U.S. 64 (1938)." Norton v. McShane, 332 F.2d 855, 860 n.6 (1964) (emphasis added).

31 *See generally* W. PROSSER, TORTS § 109 (3d ed. 1964); RESTATEMENT (SECOND) OF TORTS, Explanatory Notes § 591, at 107-08 (Tent. Draft No. 12, 1966); Becht, *supra* note 14 at 1146-48; Note, *Defamation and the Privileged Speech Hierarchy — How Low Can You Go?*, 17 DEPAUL L. REV. 231 (1967).

32 Heine v. Raus, 261 F. Supp. 570 (D. Md. 1966).

33 *Id.* at 571.

34 It is slanderous *per se* to injure one in his trade or business by the publication of slander which may induce others to believe that the victim is incapable of conducting his trade in a proper manner. W. PROSSER, TORTS § 106 (3d ed. 1964). In addition, it may be slanderous *per se* to charge another with treason even though a state of war is not in existence. Zegerreis v. Van Zile, 180 App. Div. 414, 167 N.Y.S. 874 (1st Dep't 1917).

Those oral defamatory remarks which cause pecuniary damage by their very nature are generally characterized as slander *per se*. Once the *per se* nature of the slander is established, the necessity of proving special damages is obviated. *See* 1 F. HARPER & F. JAMES, TORTS § 5.14, at 387 (1956).

National Commander; he maintained that the communications were made only to other members of the Legion and only on proper occasions. At this point, the Deputy Director of the CIA, Richard Helms, submitted an affidavit to the court disclosing that Raus was a secret CIA agent. Subsequently, Helms submitted two additional "clarifying" affidavits, stating that Raus had been acting within the scope and course of his employment, and pursuant to express Agency instructions, when he uttered the slanderous remarks.[35] As a result, Raus was granted leave, over plaintiff's objection, to file an amended complaint asserting the defense of absolute privilege. The district court was apparently unwilling to penalize the defendant since his failure to assert the defense in his first answer was due solely to the Agency's delay in granting him authority to do so.[36]

The inherent difficulties in the case became even more evident to the plaintiff when he served over four hundred interrogatories on the defendant. The CIA formally claimed the state secrets privilege on the ground that the security of the nation would be compromised if any further information regarding Raus' employment was disclosed.[37] The defendant moved for summary judgment at the same time the interrogatories were served, but the court nevertheless directed him to answer several of them. However, the state secrets privilege effectively foreclosed response to any question which could have conceivably impaired the privilege. After argument was heard on the defendant's motion, the district court entered summary judgment in his behalf.[38] Placing reliance upon the Agency's affidavits, considered in conjunction with the appropriate federal statute governing the duties and respon-

35 More particularly, the affidavits stated that Raus "was instructed to warn members of Estonian emigré groups that Eerik Heine was a dispatched Soviet intelligence operative, a KGB agent" in order "to protect the integrity of the Agency's foreign intelligence sources," some of which apparently existed within Raus' very own group. 261 F. Supp. at 573.

36 Raus had entered into a secrecy agreement with the Agency in May 1963. It prohibited any disclosure regarding his connection with the CIA without written authorization. For the text of the agreement see 261 F. Supp. at 571 n.1. Punishment for violation of the agreement included life imprisonment or death. 18 U.S.C. §§ 793-94 (1964).

37 The state secrets privilege has been recognized in English and American law for many years. When successfully asserted, the privilege permits the exclusion of any evidence that might endanger the national security if disclosed. *See* 18 U.S.C. §§ 793, 794, 798 & 1905 (1964); United States v. Reynolds, 345 U.S. 1 (1953); Totten v. United States, 92 U.S. 105 (1876); 8 J. WIGMORE, EVIDENCE §§ 2378-79 (McNaughton rev. ed. 1961); Zagel, *The State Secrets Privilege*, 50 MINN. L. REV. 875 (1966).

38 For a comprehensive treatment of the facts leading up to the court's judgment, including references to newspaper articles pointing to some interesting aspects of the case, see Comment, *Spying and Slandering: An Absolute Privilege for the CIA Agent?*, 67 COLUM. L. REV. 752 (1967).

sibilities of the Director of the Central Intelligence Agency,[39] the court found that Raus had acted within the scope of his authority as an employee of the CIA. Once this critical issue had been resolved in the defendant's favor, the principles enunciated in *Barr* were utilized to afford him the defense of absolute privilege.

On appeal,[40] the circuit court majority reaffirmed the validity of the CIA's invocation of the state secrets privilege. The court quoted extensively from *United States v. Reynolds*,[41] as had the district court, in an attempt to establish that the CIA had properly utilized the privilege in view of both the facts of the case and the inquiries made by the district court.[42]

The court also approved the application of the "*Barr* doctrine" in determining whether the absolute privilege had been properly granted to respondent Raus. Indeed, the court believed that the instant case followed the precedents of *Barr* more closely than *Barr* itself, providing, of course, that one could reasonably assume that the defamer was, in reality, the Agency's Director. The court reasoned that by the very nature of the functions performed by the Director his relationship to the Chief Executive was considerably closer than that of an Acting Director of Rent Stabilization, the position occupied by the defendant in *Barr*.[43] The Agency's authority *to order* one of its employees to de-

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39 With respect to the defendant's scope of authority, the plaintiff contended that Raus' statements "'were actions beyond the statutory power of the CIA', because 50 U.S.C.A. § 403(d)(3) provides '[t]hat the Agency shall have no . . . *internal-security* functions. . . .'" 261 F. Supp. at 576 (emphasis added). The court countered by citing from the same sub-section: "[O]ne of the functions entrusted to the [CIA] is 'protecting intelligence sources and methods from unauthorized disclosure;'" and the protection of "foreign intelligence sources located in the United States [is] within the power granted by Congress to the CIA." *Id.* The court also examined another CIA affidavit which incorporated paragraphs of a document classified as "secret", and which apparently dealt more specifically with the Agency's authority to conduct activities within the United States. This examination was *in camera*, but the court did not consider the affidavit in reaching its decision. *Id.* at 567 n.4.

Secondly, the plaintiff contended that Raus failed to show *specific* authorization from an Agency superior with the requisite authority to order him to slander Heine. However, the CIA successfully argued that 50 U.S.C. § 403(g) (1964) prohibited disclosure of such information.

40 Heine v. Raus, 399 F.2d 785 (4th Cir. 1968).

41 345 U.S. 1 (1953). In *Reynolds*, plaintiffs brought an action against the government under the Federal Tort Claims Act after the death of their civilian husbands in the crash of a B-29 aircraft which had been testing secret electronic equipment. The plaintiffs moved for production of the Air Force's investigatory material. The Court held the material immune from disclosure under the state secrets privilege, finding that the claiming of the privilege was proper if the circumstances reasonably indicated that military secrets were involved.

42 399 F.2d at 788.

43 *Id.* at 789.

fame a suspected Soviet agent was also re-examined by the circuit court, and contrasted to the defendant's authority in *Barr*:

> The CIA and its Director are specifically charged with the duty and responsibility of protecting sources of foreign intelligence and methods of collecting such intelligence. That aliens within this country are sources of foreign intelligence . . . has been recognized by Congress. . . . Unlike Barr, who acted under no direction or specific authorization to issue press releases, action here to protect the integrity of sources of foreign intelligence was explicitly directed by Congress. . . .[44]

Chief Judge Haynsworth, writing for the majority, responded to the contention that the defamation of Heine was deliberate by declaring that it was not any more deliberate than the defamation of the plaintiffs in *Barr*, "and its purpose was loftier."[45] In the view of the majority "enough [appeared] to relate the defamation to governmental interests" in spite of the assertion of the state secrets privilege by the Agency.[46] Employing the traditional balancing test, the court clearly resolved that to deny the Agency the privilege to defame in situations such as this would be a threat to the national security, "notwithstanding the devastating impact of the warning upon the one thus accused of espionage."[47]

To this point, the opinion had been based upon the assumption that the Agency's Director was Heine's defamer. Thus, the majority still had one more issue to resolve: how, if at all, could the absolute privilege be extended from the Director to Raus? The court found the extension to be "a necessary corollary of the superior's privilege."[48] Utilizing principles of agency,[49] the court declared that the absolute privilege would be available to Raus if his instructions had been issued with the approval of the Director, or a subordinate possessing the necessary authority, or finally, if Raus' act had subsequently been ratified[50] by an official with the proper authority.[51] But the court va-

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44 *Id.*

45 *Id.*

46 *Id.*

47 *Id.* at 790.

48 *Id.* The court again referred to the situation in *Barr*, stating that

> [t]here would be little purpose to a cloak of immunity for Mr. Barr if Mr. Matteo were allowed to maintain an action for defamation against all of those subordinates in his office who "published" the defamation in the course of handling and distributing the press release. . . . If the circumstances impose a compelling moral obligation upon the superior to defend and indemnify the subordinates, immunization of the superior alone from direct defamation actions would be a useless formalism.

49 *See* RESTATEMENT (SECOND) OF AGENCY § 345 (1958).

50 The issue of ratification arose when the court, conceding the privilege of the Director to slander, was unable to discover evidence of the delegation of this authority to Raus prior to the publication of the slander. This fact is pointed out and relied upon in the dissenting opinion: "Helms' affidavit of April 1, 1966, shows a broad delegation of

cated and remanded because of the "permissible inference" that Raus' instructions had never been approved by an Agency official with the requisite authority.[52] However, the court, although ruling favorably to Heine in vacating the summary judgment, was, in effect, sending him to almost certain defeat in the district court. For the majority opinion concluded that disclosure of the *very official* who gave Raus his orders was not what was sought; instead, the only question remaining unanswered was whether an official with the requisite authority authorized, approved, or ratified the instructions.[53] If the state secrets privilege is again invoked successfully, pertinent disclosures of this sort may be made *in camera*, in spite of the fact that this procedure would seriously interfere with the plaintiff's normal rights. "[I]f the two interests cannot be reconciled, the interest of the individual litigant must give way to the government's privilege against disclosure of its secrets of state."[54]

Judge Craven, concurring and dissenting in part, approved the vacation and remand of the district court judgment, but for different reasons. Unquestionably, his strongest objection to the majority opinion was the extension of the privilege to Raus,[55] who, in Judge Craven's view, had not shouldered the burden of proof by affirmatively demonstrating that he was entitled to executive immunity. However, conceding even the establishment of authorization by the *Director himself*, the dissent contended that the application of the absolute privilege in this context would extend *Barr* "beyond its breaking point." Several arguments were advanced in support of this contention. For instance, the dissent insisted that the Supreme Court never intended *Barr* to be interpreted as authorizing the implementation of defamation "as an instrument of national policy." Moreover, even if the *Barr* Court had intended such a result, the privilege to defame in such circumstances must be limited to responsible federal officials, such as the Director or other Agency officials possessing the requisite discretionary authority.[56]

powers to the Deputy Director effective April 28, 1965 — long after the defamation of Heine occurred in 1963 and 1964." 399 F.2d at 792 n.4 (dissenting opinion).

51 399 F.2d at 790-91.

52 This is an inference which the court believes is unlikely. *Id.* at 791.

53 *Id.*

54 *Id.*

55 One of Judge Craven's more minor objections to the majority opinion was that under Rule 56(e) of the Federal Rules of Civil Procedure the CIA's affidavits were conclusory and, therefore, inadmissible: "I believe it error to accept general assertions as a basis for summary judgment where the opposing party is without access to information normally available to test the affidavits because of the state secrets privilege." *Id.* at 791-92 (dissenting opinion).

56 To immunize millions of government subordinate employees from liability for intentionally slandering private persons upon their mere explanation that they were told

Secondly, Judge Craven was disturbed by the absence of such justifying factors as had existed in previous cases granting lower federal officials absolute immunity. These factors included: the presence of information in the communication that would serve the public's interest of discussion and criticism of government activity; the "confidential" nature of the communication — free communication *within* the government being necessary to its proper and efficient functioning; alternate judicial or administrative proceedings wherein Heine might vindicate himself; and clearly defined and notorious administrative procedures requiring punitive action to be taken against CIA employees who have exceeded their authority.[57]

The dissent's final contention questioned the necessity of granting Raus an absolute privilege. Instead, it suggested that the district court should have examined the possibility that a qualified privilege might exist by virtue of Raus' status as National Commander of the Legion, or by virtue of Heine's status as a public figure within the meaning of the rules set forth in *New York Times v. Sullivan*.[58]

Many of the fears expressed by the dissent can be ameliorated through a careful examination of the majority opinion. In deciding *Heine*, the Fourth Circuit has not broadly sanctioned the intentional defamation of innocent individuals by "millions" of subordinate government employees, who would then step back and claim they were directed to do so and thus acted within the scope of their employment. Rather, the majority opinion demands a narrower construction. One must bear in mind that the court relied upon principles of agency in extending the privilege to Raus. Merely "asserting" that one has acted within the scope of his employment, after being told to do an act, does not confer absolute immunity from any resultant liability.[59] This fact is demonstrated somewhat by the court's action in vacating and remanding the case — in effect, an effort to preclude the grant of immunity to Raus if it is shown that his or the Agency's claims are mere assertions. The court must explicitly find that the superior had the privilege before the subordinate will be permitted to exercise it. If the Postmaster General had ordered the Department's lowest-ranking

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to do it, and the assertion that it was within the scope of employment, destroys, in my opinion, the balance that was struck in *Barr*. *Id.* at 793 (dissenting opinion).

57 *Id.* The availability of alternate remedies seems to have initially been suggested as some justification for applying the doctrine by Veeder, *supra* note 8, at 468. *See also* Comment, *Spying and Slandering: An Absolute Privilege for the CIA Agent?*, 67 COLUM. L. REV. 752, 759-65 (1967).

58 376 U.S. 254 (1964).

59 RESTATEMENT (SECOND) OF AGENCY § 343 (1958).

employee to call Heine a Soviet agent for the same alleged purposes Raus defamed Heine, could one seriously contend that the employee would be privileged, absent truth as a defense, upon the mere assertion by the Postmaster General that the employee was acting within the scope of his employment? Furthermore, could a cogent argument be made that the Postmaster General himself would be immune from suit absent the authority to protect this country's sources of foreign information? Clearly, these questions must be answered in the negative, because none of the federal cases to date have given a federal official the right to defame for defamation's sake. There is little doubt that the Postmaster would be acting beyond the outer perimeter of his line of duty. The test as to the official's scope of authority must first be satisfied, although where discretionary acts are the subject of investigation, the question is an admittedly close one.[60]

The decision might appear somewhat harsh if it is assumed that Heine is innocent of the charge. As the district court clearly pointed out, an innocent victim has *no* viable recourse in such a case.[61] The thought of such an unfounded charge and the absence of any remedy appears repugnant to our fundamental concepts of democracy.[62] Innumerable questions plague one's mind and conscience.[63] However, assuming that they all point to the very strong possibility that Heine has been wronged, the balance is still in favor of granting CIA agents in Raus' position the absolute privilege. The broad pronouncement in *Barr* indicates that the interests of the individual must be balanced against the public interest, expressed here in the form of the national security. For the *Barr* decision unquestionably foresaw situations similar to that before the *Heine* court when it declared:

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60 Barr v. Matteo, 360 U.S. 560, 574 (1959).

61 It cannot be denied that the combination of (1) the privilege against liability for defamation asserted by the defendant and (2) the privilege against discovery of the secrets of the CIA asserted by the Government, places plaintiff in a very difficult position. But the fact that the two privileges operate in concert in the instant case does not affect their validity. 261 F. Supp. at 578.

62 *See* Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951), and particularly the appendix to the concurring opinion of Mr. Justice Black. *Id.* at 146.

63 What if the Agency received the information about Heine from a double-agent, who had been instructed to destroy Heine's good name in this country in order to put an end to his anti-Communist lectures? Imagine a personal grudge against Heine by Raus' superior, assuming he possessed the authority to order, and did in fact order, Raus to publish the slander. Would the Agency admit that the act was motivated by the personal animosity of the superior, and was therefore without the scope of his authority? Would the Agency risk disclosing his name or taking disciplinary action against him, when, in all other respects, he might be their best field-man? Could the Agency risk disclosing the actions of *any* unauthorized official when the possibility exists that such disclosure would cause the official to compromise Agency secrets either in asserting his defense, or because of personal vengeance towards the Agency for not "backing him up"?

> [T]o be sure, as with any rule of law which attempts to reconcile fundamentally antagonistic social policies, there may be occasional instances of actual injustice which will go unredressed, *but we think that price a necessary one to pay for the greater good.*[64]

As indicated in both the district and circuit court opinions, there was a distinct possibility that the CIA's foreign sources of intelligence might be jeopardized. Thus, before the Agency's actions can be criticized, the other courses of action which were available should be examined. And one criterion which should be given substantial weight in assessing the applicability of the absolute privilege is whether or not the action could be considered *reasonable* under the particular facts.[65] The slander could have been published by an official of the Agency, but it is arguable that such publication would have been impractical or less effective than Raus' publication under the circumstances. Raus was holding the most respected and influential position in the Legion, and it was probably for this reason that he was initially employed by the CIA. While the Director or Deputy Director of the Agency might have been convincing and effective, it seems that the ordinary, ministerial field operations of the CIA need not be conducted by its highest ranking officers. In any case, would Heine have been in a better position if the Agency's Director released a one-line statement to the wire services declaring that "Eerik Heine is a Soviet agent"? He might have saved some litigation expenses in that event, but his reputation would not merely have been injured; it would have been "shattered." Hence, it may be logically asserted that the Agency employed the best means to serve its purposes with the least amount of resultant injury to Heine, and therefore acted reasonably.

It is thus submitted that the majority decision was correct in extending the absolute privilege to those lower-ranking federal employees who faithfully and perseveringly carry out the orders of their superiors. To permit recovery against the ministerial officer who finds himself in Raus' position would seriously impede the operations of the many governmental organizations which function along the same quasi-military lines as the CIA. Where speed, obedience and secrecy are the necessary corollaries to the performance of the functions in question, hesitancy arising out of fear of subsequent litigation concerning those acts can only be detrimental to the national interests.

It must be noted further that the Agency could not allow Heine to defeat Raus' original defense of a qualified privilege. Raus and the

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64 360 U.S. 564, 576 (1959).

65 *Cf.* Jennings, *Tort Liability of Administrative Officers*, 21 MINN. L. REV. 263, 301-14 (1937).

Agency would have incurred more than a purely monetary loss if Heine had overcome the qualified privilege by proving malice on Raus' part. The entire operation, the purpose of which was to preclude Heine from gaining access to the Agency's foreign intelligence sources, would have been a failure. Thus, Heine's alleged spying operations would have been facilitated by the CIA itself, Raus would have appeared to be a "liar," and his future value to the Agency would have been severely diminished. Furthermore, it is apparent that if Raus were required to pay Heine upon the latter's success at trial, the Agency would have been "obligated" to pay him the amount of the judgment. Ironically, the same public whose interest the Agency was attempting to protect might have been forced to further finance that protection beyond the amount already extracted from it for that very purpose.

The Agency's most efficient safeguard against indiscriminate defamation by its agents is the secrecy agreement.[66] If an undercover agent acts without the scope of his authority, the Agency need only enforce the secrecy agreement, thereby forcing the agent to appear in any subsequent civil action with whatever defense is available to him in his role as a private citizen. If the agent violates the agreement, he is subject to criminal penalties in addition to any civil liability that he might incur in an action brought by the plaintiff. The CIA can disclaim any assertion by the agent that he acted within the scope of his authority by merely submitting an affidavit to the contrary, and simultaneously invoking the state secrets privilege.

It is interesting to note that in order to reach its decision in the instant case, the majority found it necessary to apply the agency principle of ratification. Ratification of Raus' acts would relate back to the time at which they were committed, and thus establish the requisite authority. Inspection of the CIA's affidavits indicates that Raus acted pursuant to instructions from someone exercising supervisory control over him. Since the Agency was apparently unable to disclose the name or position of that superior, the court needed a nexus between Raus' acts and some official in the Agency who could exercise the necessary discretionary authority required to either defame Heine personally or to order his defamation by a subordinate. The court indicated that ratification would provide that nexus even though an additional hardship would be imposed upon one in Heine's position.

It should be pointed out that no court has previously employed the doctrine of ratification in this manner. Rather, ratification has gen-

[66] *See supra* note 36.

erally operated to the advantage of an injured party, providing an additional defendant against whom he may proceed. In effect, the *Heine* court has extended the absolute privilege held by an undisclosed principal to the apparent advantage of an agent guilty of tortious conduct. The CIA is able to accept only the "benefits" of Raus' acts, and none of the "liabilities," by virtue of the executive absolute privilege it enjoys. Heine, instead of having two parties to proceed against, or at least one in a financial position to bear the loss, has none. But again, if these results seem harsh, one must recall the uniqueness of the situation at hand.

The Fourth Circuit has not extended *Barr* in deciding *Heine*; it has merely clarified it. While the decision may disturb the individual reader, it does so for the same basic reasons that *Barr* and similar cases involving actions by an administrative agency resulting in *damnum absque injuria*[67] provoke considerable controversy — the public is understandably reluctant to permit infringement upon its constitutional safeguards even on its own behalf. Yet, it is highly improbable that the Supreme Court will reverse the current trend granting the absolute privilege to federal employees exercising even a minute degree of discretion in areas where the national security is involved. It is now up to Congress to determine if the increasing number of innocent individuals suffering as a consequence of this rule behooves legislative action. Furthermore, it must be borne in mind that because of the nature of the CIA, there are few, if any, restraints upon the operations of this largely autonomous agency.[68] As suggested by many commentators after the *Barr* decision,[69] a possible solution would be the amendment of the Federal Tort Claims Act[70] to permit recovery for defamation by officials of less than policy-making rank, who have not acted in good faith, *i.e.*, within the scope of their duties under proper instructions. This would at least afford the courts an opportunity to examine the wronged individual's claim, and, if properly brought, to permit recovery while still affording officers the protection they need in order to fulfill their assigned functions without fear of incurring civil liability for their official acts.

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[67] *E.g.*, F.T.C. v. Cinderella Career & Finishing Schools, Inc., 404 F.2d 1308 (D.C. Cir. 1968); Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950), *aff'd without opinion*, 341 U.S. 918 (1951).

[68] It is generally known that the President is unable to keep abreast of all the operations of the CIA. It should also be noted that Congress has very little control over the Agency under its appropriation powers, since its activities must be kept under the utmost secrecy for national security purposes.

[69] *Supra* note 29.

[70] 28 U.S.C. §§ 1346(b), 2671-80 (1964).